

JETINOS ZIVANOMOYO
versus
HELLEN BAWANGE DINGANI

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
MASVINGO, 13 June 2018 and 16 January 2019

Civil appeal

Adv *M. Ndlovu*, with him, Adv *W. Chinamora*, for the appellants
Mr *O. Mafa*, for the respondent

MAFUSIRE J

- [1] This was an appeal from a decision of the magistrate’s court. We dismissed it soon after argument and gave reasons *ex tempore*. The appellant has now sought written reasons.
- [2] In the court *a quo* the respondent, hereafter referred to as “*the purchaser*”, where appropriate, sued for specific performance in respect of a property that she had bought from the appellant in terms of a written agreement of sale. She proceeded by way of a court application. The draft order, apart from costs, sought an order directing the appellant, hereafter referred to as “*the seller*”, where appropriate, to sign forthwith all the documents necessary to enable transfer of the property to herself, failing which the messenger of court should be empowered to stand in his stead and sign. She said in terms of the agreement, the parties had consented to the jurisdiction of the magistrate’s court.
- [3] In his notice of opposition the appellant took a point *in limine* that the remedy sought was not one contemplated by the agreement of sale. He said in terms of it, in the event of a breach by himself, the only remedy available to the respondent was cancellation of the agreement upon a prior demand to make good the breach within 14 days and that this had not been done. He said specific performance was a remedy alien to the written agreement.

- [4] An adjunct to the above objection was that in terms of the Magistrates Court Act, *Cap 7:10*, a magistrate's court has no jurisdiction to grant specific performance in the absence of an alternative claim for damages. He cited s 14(1)(d) of the Act.
- [5] On the merits, the appellant's basic defence was that the respondent had only paid part of the purchase price; that as such she was in breach of the agreement of sale, and that therefore she was not entitled to specific performance. He prayed for the dismissal of the application with costs.
- [6] The court *a quo* felt there was a dispute of fact that was incapable of resolution on the papers. It referred the matter to trial.
- [7] After a full scale trial the court *a quo* found in favour of the respondent and granted specific performance. The appellant appealed. We felt the appeal had no merit. We dismissed it as aforesaid.
- [8] The seller's argument that the remedy sought by the purchaser was not one contemplated by the agreement of sale was premised on clause 11. It read:
- "Should the Seller breach any of the conditions of the Agreement, the Purchasers shall in writing within fourteen (14) days call upon the Seller to remedy, failure to which the Purchasers shall be entitled to cancel the Agreement and claim the return of the Purchase Price or damages."
- [9] The point *in limine* was all smoke. The approach by the seller was to skin and disembowel the agreement, yank individual clauses out and hang them up to dry. The result was to turn an otherwise reasonably worded commercial agreement into a vain document that was an end in itself, instead of it being a means to an end. The agreement of sale was an instrument for the seller to transfer real rights in the property sold and the purchaser to acquire them. That was the object. That was the purpose. The court

had to give effect to it. Otherwise the law would be damned. As ROBINSON J would put it¹:

“Let me add that to have found in this matter that there was no contract between the parties **would have been artificial in the extreme** and, I am sure, would have prompted any reasonable businessman to remark that if, before, he had thought **the law was an ass**, he now knew for certain that it was, since it had shown itself to be the domain of niggling academics **out of touch with reality and to have nothing to do with the cut and thrust of the business world** where one is concerned, not with the legal niceties pertaining to, but with the perceived existence of a contract” (*emphasis added*)

[10] The point is, a purchaser who buys a property and performs his side of the bargain, or is ready to perform, is entitled to take title. The seller is obliged to deliver. If he fails or neglects or refuses to do so, the purchaser is entitled to sue for specific performance. This is quite elementary. As long ago as 1912 INNES JA said in *Farmers’ Co-operative Society (Reg) v Berry* 1912 AD 343, at p 350:

“*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract.”

[11] A plaintiff has the right to choose whether to hold a defendant to his contract and claim performance by him of what he bound himself to do, or to claim damages for the breach: see *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at p 378. The defendant has no such right of election. He cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him. In the exercise of its discretion the court may grant or refuse specific performance. Specific performance will be refused if it will lead to an injustice, or if it will be unduly harsh and burdensome on the defendant. There was nothing like that in this case.

[12] The court exercises its discretion to grant or refuse specific performance judiciously, not whimsically. The discretion is not confined to specific types of cases. It is not circumscribed by rigid rules. Each case depends on its own set of facts: see *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H).

¹ In *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H)

[13] In the present case, clause 11 of the agreement did not oust the purchaser's right to sue for specific performance. It merely pronounced one of the remedies available to her in the event of a breach by the seller. A proper and holistic study of the agreement shows that it was the intention of the parties that upon her performing her side of the contract she would get transfer of the property. Otherwise why would clause 1.ii.(4) refer to the payment of capital gains tax, if not in contemplation of transfer? Or clause 1.iii. that said the balance of the sale proceeds would be released to the seller upon the registration of transfer? Or clause 5 that said risk and profit in the property would pass to the purchaser on the date of registration of transfer?

[14] The court *a quo* was right to dismiss the point *in limine*. Its adjunct that the claim for specific performance was incompetent because it was not accompanied by a claim for damages was equally properly dismissed. The appellant went to town about a patently harmless error in clause 15 of the agreement of sale which cited a wrong section in the Magistrates Court Act as being the one in terms of which litigants can consent to the jurisdiction of that court even though the claim might exceed its monetary jurisdictional limit.

[15] Clause 15 of the agreement said in part:

“Both parties hereby consent, in terms of section (13)(1)(c) (*sic*) of the Magistrate's Court Act Chapter 18 (*sic*), to the province of Masvingo, held at Masvingo in respect of any action or matter arising out of this Agreement, notwithstanding that such action or the foregoing, the Seller shall have the right to institute such proceedings in the High Court of Zimbabwe should he/she elect to do so.”

[16] To that, the appellant's argument was²:

“The parties signed an Agreement of Sale where they consented to a Magistrate's Court sitting at Masvingo in terms of Section 13 (1) (c) of the Magistrate's Court Act, Chapter 18. The Respondent's lawyers used the copy of the contract to found jurisdiction of the court *a quo*. On the date of signing, March 2015 the statutes had been amended and there was no longer Section 13 (1) (c) of the Magistrate's Court Chapter 18. No amendment was done and before the matter was referred to trial, this point was raised by the Appellant but dismissed by the Learned

² Paragraph 8.2 of the Appellant's Heads of Argument

Magistrate. Hence in principle the court *a quo* as at the date of hearing the application and trial lacked jurisdiction to deal with the matter where specific performance was sought without alternative to damages, in contravention of Section 14 (1) (d) of the Magistrate's Court Act (Chapter 7:10).”

- [17] The appellant's argument was all mixed-up. In terms of SI 163/2012 (Magistrates Court [Civil Jurisdiction] [Monetary Limits] Rules, 2012), the monetary civil jurisdiction of the magistrates is \$10 000 for, among others, actions for the delivery of movables or immovables.
- [18] In terms of s 11(1)(b)(ii) of the Magistrates Court Act, the magistrate's court is conferred with jurisdiction, where the delivery or transfer of any property, movable or immovable, is claimed, if the value of such property does not exceed such amount as may be prescribed in rules (i.e. \$10 000), whether in lieu of, or in addition to, any other claim, which shall include a claim for the cancellation of any agreement relating to such property.
- [19] The appellant made no reference at all to the proviso to paragraph (b) of s 11(1). That proviso expressly confers jurisdiction on the court to try any action or case referred to in, among others, subparagraph (ii) above, otherwise beyond its jurisdiction if the defendant has consented thereto in writing. It is all very clear.
- [20] But of course the appellant's argument was premised on s 14. This section gives instances when the court has no jurisdiction. One such is in subsection (1)(d). In terms of it, the court has no jurisdiction where the specific performance of an act is sought without an alternative claim for damages. But characteristically, the appellant ignored the proviso thereto. It says: provided that a court shall have jurisdiction to order (among other things) the delivery or transfer of property, movable or immovable, not exceeding such amount as may be prescribed in rules.
- [21] The mistaken reference in the parties' agreement of sale to a non-existent s 13(1)(c) of the Magistrates Court Act was of no moment. The fact remains that in terms of the Act a defendant can consent to the jurisdiction of the magistrate's court even where the

plaintiff's claim exceeds that court's monetary jurisdiction. In the present case both parties had given their advance consent on the signing of the agreement of sale even though their reference to the specific provision as permitting such consent was erroneous. That could not have been a reason to non-suit the respondent.

[22] On the merits, most of the essential facts were common cause. The agreement of sale was brokered by a firm called Net Seven Real Estate ("*Net Seven*"). The property was a 3-bedroomed house, and other rooms, in the high density suburb of Runyararo West, Masvingo. The purchase price was \$31 000. It was payable in cash upon the signing of the agreement. An additional \$300 was payable by the purchaser by way of service charges to cover administration costs. All payments would be made into Net Seven's trust account with Standard Chartered Bank. The purchase price would be held in trust pending transfer of the property. But before transfer, payments out of the purchase price would be permissible for any mortgage bond; agents' commission; rates, water and electricity and capital gains tax. The balance would be disbursed to the seller upon the registration of transfer.

[23] The purchaser signed the agreement on 30 March 2015. The actual date in March when the seller might also have signed was not inserted. In fact, there is no telling whether it was in March or some other month that the seller signed. However, this was not an issue. On 2 April 2015 the seller signed the special power of attorney to pass transfer. The purchaser deposited \$300 and \$31 000 into Net Seven's trust account on 8 April 2015. From the purchase price the seller withdrew \$16 290 to clear the mortgage bond outstanding against the property. On 16 April 2015 both parties signed the statutory declarations regarding capital gains tax whereby the purchaser guaranteed that she had paid the purchase price in full, and the seller also guaranteed that he had received it in full.

[24] What triggered the litigation was, according to the purchaser and her witnesses, the lack of cooperation by the seller to take the necessary final step to effect transfer. The parties had to appear before the Zimbabwe Revenue Authority ("*Zimra*") for the purposes of pre-transfer interviews in connection with the sale, as a prelude to the

issuing by Zimra of the capital gains tax clearance certificate that is one of the batch of documents required to be lodged with the Deeds Registry on the registration of transfer.

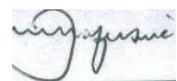
- [25] That the seller was not cooperative was self-evident. He claimed the purchaser had not paid the purchase price in full. But this was factually incorrect. The purchaser had paid the purchase price in full. Receipts given to her by Net Seven on the payment of the \$300 and \$31 000 were produced. At any rate, the seller had already declared that she had paid in full. He had even gone on to sign the special power of attorney to pass transfer.
- [26] The seller's real gripe was in fact that the sum of \$14 710 still remained outstanding. This was the balance of the \$31 000 after he had withdrawn the \$16 290 for his outstanding mortgage. There were allegations that appeared uncontroverted that a director or employee of Net Seven, who had brokered the sale, had stolen the balance of the purchase price and skipped the country. The purchaser had reported the matter to the police and the seller had been called as a witness in the pending criminal case which apparently was in an indeterminate state owing to the absence of the accused.
- [27] Given the nature of the appellant's defence, the whole case before the court *a quo*, apart from the points *in limine* above, was whose agent was Net Seven in the agreement of sale? The purchaser said Net Seven was the seller's agent; that once she had paid in terms of the agreement of sale she had discharged her obligations and was entitled to take transfer. The seller said Net Seven was no one's agent but merely a broker that had fixed the agreement of sale on behalf of both parties. He argued that both parties had been responsible for paying Net Seven and pointed to the \$300 that the purchaser had paid.
- [28] The seller's arguments were fallacious. Net Seven was not a broker for both parties. It was the seller's agent. Evidence placed before the court *a quo* was that it was the seller who approached Net Seven with instructions to sell the property and to find a buyer. Net Seven looked up to him for their commission. The commission was guaranteed

from the purchase price. The \$300 paid by the purchaser was not a commission but a service charge.

[29] Thus the court *a quo* was correct to find that the respondent's payment to Net Seven was payment to the appellant. She had fulfilled her obligations in terms of the agreement of sale. That the purchaser might have at one time reported a case of theft against a director or employee of Net Seven in which the appellant might have been lined up as a witness was a harmless diversion. It had no legal consequence on the parties' rights and obligations under the agreement of sale. It was up to the appellant to pursue the theft case himself if there was substance to it. Otherwise, I agree with the respondent that this case is on all fours with that of *Cleogoz Investments (Pvt) Ltd v Hougaard & Anor* HH 250-17 where this court held that payment of the purchase price by the purchaser to the estate agent contracted by the seller was payment to the seller. To have held otherwise would have led to an absurdity. If the estate agent was held to be the purchaser's agent, then the purchaser would in fact, be paying to herself. That would be absurd

[30] It was upon the above reasons that we dismissed the appeal with costs

16 January 2019



Hon Mawadze J: I agree _____

Muzenda & Partners, legal practitioners for the appellants
Mutendi, Mudisi & Shumba, legal practitioners for the respondent